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THE ENGLISH DOCTRINE OF USES, AS AN ELEMENT OF THE AMERICAN LAW OF CONVEYANCE.

The alienation of real property anterior to the statute of uses presents to the consideration of the legal student two remarkably distinct and well defined periods. The earlier one was that of simple, unadulterated, legal ownership, and the extremest simplicity was a controlling feature, both of the estates which might be created as well as the method of their inception and alienation. The transfer of landed estates was discouraged by cumbersome restrictions; no right in land was recognized unless it was clothed with possession, while possession and ownership could only be conveyed to another by the simplest method of transferring title ever known to the law—open and notorious livery of seisin. The law rested thus for years, but the wants of extending intercourse, and a growing commercial spirit, were hostile to such *status*, necessitating a departure from such unwieldy requirements, and effecting in the end a more commodious and suitable method of transfer. The courts of chancery—and here begins the second period, and the birth of distinction between equitable and legal ownership—at a date as early as the reign of Edward III, or Richard II, began to recognize a double ownership in lands, and then grew up a consequent discrimination

between equitable and legal ownership.[1] The equitable owner entitled to the rents and profits of land, whereof another person had the legal title and seisin, was possessed of an estate of which the courts of chancery took cognizance under the name of "use." It is possibly not a legitimate subject of inquiry in this behalf, whether or not the incorporation of this doctrine upon the common law, was a subtle attempt on the part of the ecclesiastical houses to evade the statutes of mortmain. It is certainly, neither necessary or within the province of this dissertation to trace the resemblance between uses and the ancient *fidei commissa;* nor, still following in the footsteps of the civil law, to discuss the introduction of the writ of subpœna,[2] and how the estate at conscience, formerly dependent upon probity and entreaty, became compellable by the courts of chancery; nor still beyond all this, and despite the numerous petitions for the abolition of the entire system, during the reigns of the 4th and 5th Henrys, how prerogative and jurisdiction was assumed and exercised, "here a little and there a little," and the system grew into an enlarged and admirable science.

The progress of the jurisdiction in this regard may be briefly stated to be: 1. Pernancy of the profits. 2. Execution of estates. 3. Defence of the land,[3] and the powers of jurisdiction being then exhausted, the system began slowly to be elaborated and construed. Though the religious houses had been concluded from acquiring the use of lands, yet the advantages which this method presented, of evading the hardships of the feudal tenure, of being devisable, descendible and especially convenient for family settlements, so strengthened in the public favor that almost the entire property of England was held in this manner.[4] Possessed of these advantages, it was not however devoid of grievances. The cestui que use, though generally in possession, was the merest tenant at sufferance: the feoffments were secret, and he who had cause to sue for land, knew not against whom to bring his action; the husband was barred of his curtesy, the wife of her dower, the lord of his privilege, and the creditor of his extent for rent. To remedy these inconveniences,

[1] 2 Bl. Com. 328.
[2] Inst. 2, 23, 12.
[3] Gilbert on U. & T. 1; Plowden, 352.
[4] 2 Rol. Abr., 780.

abundant statutes were passed, the intent of which was to remove these objections, and to dispel the prevalent obscurity and confusion of title, on account of which innocent purchasers were so frequently defrauded.[1] Legislators alarmed at the continuance of a system which required such frequent enactments to repel its encroachments upon the domain of common law prerogative, by the passage of a statute in the reign of Henry the eighth, attempted to restore the original simplicity of the common law, and terminate the existence of this foundling doctrine which "had for its parents fraud and fear, and for its nurse a court of conscience."

The enactment, after reciting the grievances consequent upon the law of uses as then understood and practiced—provided,[2] "that when any person shall be seised of lands, &c., to the use, confidence or trust of any other person or body politic, the person or corporation entitled to the use in fee simple, fee tail, for life or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estates, as they have in the use, trust, confidence, and that the estate of the person so seised to the use shall be deemed to be in him or them that have the use, in such quality, manner, form and condition as they had before in the use.

"Up then to this time, according to Lord Bacon, a use was no title, right or interest in law, neither *jus in re* nor *ad rem*, that is, neither an estate nor a demand; it was nothing for which a remedy was given by the courts of the common law, being a species of property totally unknown to it, and for which, therefore, it was impossible that it should make provision."[3]

As the statute imports, it is an act for the transferring of uses into possession. It executes the use *eo instanti* with the instrument of conveyance, conveying the possession to the use, and transferring the use into possession, making the cestui que use owner complete both in law and equity. In so far as that instrument contemplated the abolition of double ownership in real property, or the discontinuance of this method of conveyancing, and a compulsory resort

[1] 1 Rich. ii. 9; 4 Hen. vi. 17; 1 Hen. viii. 1; 19 Hen. 7, 15; 4 Hen. v. 7, 15; 1 Rich. iii. 1; 11 Hen. vi. 35.

[2] 27 Hen. viii. 10.

[3] Bac. Read. 59; 1 Rep. 140, a.

to the elder methods of assurance known only to the common law, it has signally failed in the accomplishment of its design. Viewing it however, not as to the ends which it was originally intended to compass, but as to the actual conveniences which it has achieved it has done much—very much. In consequence of the passage of that statute, and the consequent exercise of jurisdiction by the courts of common law over this branch of the law of real property, methods of transferring landed estates have been originated which give to that species of property almost equal facility of disposition with negotiable paper. Effecting a greater revolution in the science of jurisprudence than any which has occurred since the violent superinduction of the feudal tenure upon the laws of the Anglo Saxons, it has proven the foundation of a system of conveyancing, which slowly elaborated and perfected by the teachings of every day experience, has continued to the present day at least, prosperous and strengthening. Having thus stated in as brief a manner as is necessary for clearness and correctness, the English doctrine of uses as left by that statute; turn we now to the other branch of our subject touching the recognition of the statute and its English interpretation by our courts, and the manner in which the theory which pervades their law, is adopted and enforced in our own.

The principles of the common law concerning emigration are among the most considerate and practical of its provisions. What a sterling legal maxim is that which entitles English subjects going to an uncivilized country to carry with them both the common and statute law existing at the time of colonization? How discreet the theory that colonial infancy shall not be left to grope its way with feeble and hesitating footsteps, first through the walks of the simpler municipal regulations, and then through the mazes of more extensive and entangling legislation, but at once and ever its growth shall be encouraged, its weakness protected and its prosperity insured, under the benign influence of a matured and healthy jurisprudence, and under the protecting ægis of the British Constitution. Laying fast hold of that doctrine, it has never been questioned that English statutes passed before the emigration of our ancestors, applicable to our situation, or in amendment or ameliora-

tion of the common law, are part and parcel of the common law of this country.[1] That the English law of conveyancing, both common and amendatory, being wholly applicable to our situation, and in the highest degree important, of necessity became our common law is true, we think, beyond a peradventure.[2] We are not forced, however, to trust solely to this vague and unsatisfactory method of determining whether the doctrine of uses, as settled by the passage and interpretation of that statute is engrafted upon our system of conveyancing. In a majority of the considerable commercial States, the leading features of the statute 27 Hen. VII have been directly recognized by decisions of the highest judicial authority and importance. In some States, when it was thought dangerous to rely solely on such a general adoption of statutes in matters of so great moment as the efficacy of deeds and the tenure of estates, the substance of the statute has been incorporated into their local laws, and thus stability and certainty given to this branch of their jurisprudence.

The task undertaken is, to examine how far the general theory of that instrument, as well as its direct provisions have been adopted in the several States. To borrow the words of Junius—"the consideration of what is reasonable or unreasonable makes no part of this question. We are inquiring now, what the law is, not what it ought to be. Reason may be applied to show the impropriety or expediency of a law, but we must have either statute or precedent to show the existence of it."[3] By the examination of the adjudications of the judicial, and the enactments of the legislative departments, we hope to ascertain definitely as to the recognition, application and modification of such precedent and statute.

In New Hampshire, it has been held that the statute is not superseded by the acts of 1791 or 1701, but impliedly recognized by them, and still in force.[4] In Massachusetts the doctrine of uses appears to have been recognized at an early day, and not disturbed under the R. S. of 1836, and in that State estates may still pass by

[1] 2 Salk. 441; Jour. of Cong. Oct. 14, 1774; 5 Pet. 233.
[2] 6 Mass. 31; 2 Met. 118.
[3] Junius, Letter xvi.
[4] 3 N. H. 234, 432; 1 N. H. 232; 15 N. H. 462.

way of use.[1] The laws of conveyancing in Maine were derived from the last mentioned commonwealth, and the legislative enactments copied *literatim*. It follows as a necessary sequence that the same operation is given to the deeds in each State, and to the due construction thereof, the decisions of the parent commonwealth are applicable.[2] Several direct adjudications are cited from Connecticut.[3] In one of them a very elaborate opinion is given, in which the court says: that the forms of their ancient conveyances show satisfactorily that even in the earlier days of that State, it had been considered that the provisions of that statute were in force, since those forms were such as had been brought into use in consequence of the passage of that statute in England, and are more peculiarly adapted to operate as consequences under its provisions than by the common law. Latrobe says in his Justice, that it is with difficulty the laws of Maryland concerning deeds can be succinctly collected and made intelligible. We find in an old case involving no less a point than title to the province, that the people of that State have considered themselves, and the courts have adjudged them entitled to the benefit of all the statutes of England antecedent to the settlement of the province.[4] By the report of William Kilty, Chancellor, in 1817, the statute was in full force and practice.[5] The legislature of New Jersey, in lieu of the statute itself, repealed during the colonial existence, passed an enactment not identical with the English statute, but it is thought embodying the theory and expressive of the leading features of that instrument.[6]

In Virginia a statute has been adopted which executes the use in the case of bargain and sale, lease and release, and covenant to stand seised or deed so operating.[7] It is by the operation of this statute, says a correspondent of Griffith's Law Register, that the tenure of real property in this State is in a great measure regulated, its influence not being less general and effective than in England. In South Carolina the substance of the statute has been re-enacted,

[1] 4 Mass. 135; 6 Mass. 24. [2] 5 Greenl. 232; see 32 Me. 329.
[3] Colony Records, vol. 1, 417, 436; Kirby, 368; 1 Conn. 354; 16 Conn. 474.
[4] 2 H. & McH. 279. [5] Report of Stat. 231. [6] R. S. (1847) 673, § 7.
[7] Code (1849) 502, § 14; 1 Lomax Dig. 188, 196; 3 Call. 482.

and the several assurances which operate under its provisions have full force and effect.[1] In Alabama, by state enactment, conveyances by bargain and sale, lease and release, covenant to stand seised, or deed so operating, suffice to pass the possession to the purchaser, equally as if he had been enfeoffed with livery of seisin[2] similar operation is given to deeds by statutes in several States: in North Carolina,[3] Kentucky,[4] Florida,[5] Rhode Island,[6] Mississippi,[7] Massachusetts,[8] Michigan,[9] and Indiana.[10] Of course a deed operative under the statutes of such States, dispenses with the theory of raising a use, and executing it by force of the statute of uses, and yet, that the system is a living and vigorous one despite the restraining influence of these local enactments, the reports of some of the States we have just cited will abundantly establish. In Delaware, it is briefly enacted that the legal estate shall accompany the use and pass with it.[11] The provision of the statutes of Arkansas, is almost the same, with the addition—as also in Pennsylvania and Mississippi—that the words "bargain and sale," shall be held to be an express covenant that the grantor is seised, &c.[12] In Pennsylvania, according to the very complete report of the judges of their Supreme Court in 1808, the effective portion of that statute has always been in force.[13] In Iowa,[14] Georgia,[15] Illinois,[16] and Missouri,[17] the essential portion of the statute is enacted and conveyances effected by virtue of the provision,—"that when any person shall stand seised of lands to the use or trust of another, by reason of any deed of bargain and sale, &c., the person entitled to such use, trust, &c., shall be deemed in lawful estate and possession, and the estate, right, title and interest, shall be in the person having the use, trust, &c., in such like estates, and after such quality as they had before in the use or trust."

[1] 2 Pub. Laws, 466; Grif. Law. Reg. 832; 2 M'Cord, 252.
[2] Clay's Dig. (1843) 156, § 35.
[3] 1 R. S. 259, c. 43, § 4.
[4] R. S. (1852) 196, c. 24, § 4.
[5] Thompson's Dig. (1847) 178, § 4.
[6] Pub. Laws, (1844) 260, § 11.
[7] How. & H. Dig. (1840) 349, c. 34, § 26.
[8] R. S. (1836) 405, § 1.
[9] R. S. (1838) 257, § 1.
[10] 1 R. S. (1852) 232, § 4.
[11] Stat. Del. (1829) 89, § 1.
[12] R. S. (1837) 188, c. 31, § 1.
[13] 3 Binn. 619 App.
[14] Laws (1839) 35, c. 28.
[15] Hotchkiss' Laws, 410, § 38.
[16] 1 R. S. (1856) 153, § 3.
[17] R. S. (1845) 218, § 32.

In California, Wisconsin and Texas, we are not able to find any thing which will either directly establish or disprove the proposition under investigation. In Tennessee, according to a late excellent work upon conveyancing, there is a decision to the effect that the statute has never been in force.[1] The statute of the state provides that "all deeds, in what manner or form soever drawn, shall be effective.[2] In Louisiana, as the common law is not the basis of their system of jurisprudence, we presume it is incontestible that the statute does not obtain. In Vermont, notwithstanding an early decision of the United States Circuit Court, that she, in common with her sister New England States, had adopted the statute[3] according to the recent judgment of her supreme court of judicature, the statute is not in force in that State,[4] and so says Chipman.[5] In Ohio, upon a fair presentation of the question to the court, we find it held—"that since the political organization of that State, they can find no trace of the authority of this statute as a rule of property, and no distinction is known in practice between uses and trusts. The system of conveyancing, although it has grown out of the English system, does not depend upon the statute of uses, but has taken its form, and derives its authority from their own statutes and local usages. Under such circumstances the recognition of the power of this statute is unnecessary and mischievous, introducing, as it would, new and complex rules of property."[6] In New York, the statute was recognized and applied for a great number of years, and the accumulative learning upon this subject which their earlier reports afford, bear faithful witness to the remark of the great master of our science, that "the use in law hath not its fellow." Upon the revision of their statutes years ago, objections were urged against the system, so serious in the estimation of the general assembly that uses and trusts, except as expressly authorized thereafter, were entirely abolished.[7] Every estate in lands is declared to be a legal right, except as otherwise provided, and every estate held as a use executed under any former statute, is declared to be a legal estate,

[1] Thornton's Conveyancing, 482.
[2] Car. & Nich. Dig. 598, § 1.
[3] Paine. C. C. 536.
[4] 23 Vt. 600.
[5] Chipman (Ed. 1793) 145, 146.
[6] 7 Ham. (1st pt.) 275; Walker's Int. 310.
[7] 2 R. S. (4th ed.) 136, § 45.

and all deeds operate as grants.[1] The wisdom or expediency of this revision it is not our province to discuss. According to an article in the American Law Magazine upon the subject, it has effectually accomplished that change which it was the design of the statute of uses to effect, the New York statutes passing the estate to the remotest cestui, and executing the ultimate trust.[2]

In order to raise a use, and have it executed according to the provisions of the statute, there must be a competent person actually seised to the use of the party beneficially entitled.[3] Cornish divides the disabilities thus,—incapacities of a personal nature, those arising from tenure, and those springing from estate.[4] Some of the old English authorities attempted to create a subtle distinction between "giving uses," and "standing seised to uses,"[5] but by our law it is thought that every one who is capable of taking lands by feoffment may be seised to use. A corporation could not anciently stand seised, although they might convey, but this distinction is regarded as a refinement not fit to be practiced in this country, and with us the word "person" of the statute is held to apply to corporations as well as individuals.[6] Some of the conveyances under the statute require adhesion to certain technical rules, as to the matter of standing seised. For example, in the deed of covenant to stand seised, the person seised may be of the blood of the covenantor. The use being synonymous with the legal estate, and the same requirements necessary in the transfer, all those who may take lands by common law assurances, may be the recipients of the use. Indeed the practical theory which underlies the system of uses has so ameliorated the hardships of the old common law rules concerning alienation, that by way of use some may take lands, who were before incapacitated. A feoffment or bargain and sale to one, for the use of the wife of the feoffor, is executed under the statute, although the husband could not convey directly to his wife.[7] When, however, the conveyance is to the separate use of a *feme covert* she may not take,[8] although by the provisions of the New York statutes

[1] 9 Barb. S. C. 324. [2] 6 Am. Law Mag. 268. [3] Bac. Read. 41.
[4] Cornish on U. 58. [5] 2 Leon. 121, 3 id., 175. [6] 11 Wheat. 392; 2 How.S.C.497.
[7] 1 Sanders on U. 95; 16 Conn. 474; 20 Johns. 85; 3 Wils, 23.
[8] 16 Pick. 330; 4 A. & E. 582.

it would seem she might.[1] As was before remarked, in a deed of covenant to stand seised, one not of the blood of the covenantor, cannot take the use. The statute provides for a cestui que use *in esse*, when therefore there is a disability, as a company unincorporated, or a person under some temporary incompetency, the feofees take the estate until such time as the disability is removed, when the statute executes the use and the estate vests.[2] The statute also makes necessary a use *in esse*, in possession, reversion or remainder, and the word "seised" of the statute applies to all freehold estates. It had been adjudged that as the statute of uses in Virginia did not make mention of this word, it was comprehensive enough to embrace terms for years.[3] The position was ably refuted by Lomax.[4] As to the kinds of property which may be conveyed, the statute itself provides for the alienation of "lands, tenements and hereditaments," and enactments of the several states have usually followed such provision. Bacon says that a use is to be understood only of those things whereof an inheritance is *in esse*.[5] No use can be conveyed in lands of which the grantor is not actually or constructively seised in possession, reversion or remainder, for every such disfusal implies of necessity a precedent possession. The estate of a mortgagor may be conveyed to uses,[6] but the interest of a mortgagor, though generally a legal seisin as against the mortgagor, is not capable of being transferred, so as to be executed by the statute.[7] Nothing whereof the use is inseparable from the possession—*quae ipso usu consumuntur*—can be granted. If the use conveyed is greater than the estate out of which the statute serves the seisin, it will cease upon the determination of the precedent estate, but will be good for that time.[8] Brief space will suffice to notice the old common law methods of assurance as made applicable under the system of uses. The more ancient and common of them is the deed of feoffment, and the distinctive feature of its operation is the notorious livery of seisin, which is necessary to convey title. Though in most of the states it is still a lawful, yet it is an exceed-

[1] 3 Barb. C. 632; 1 id. 220.
[2] 4 Wend. 494; 1 Greenl. 271; 5 W. & S. 323.
[3] 3 Call, 482.
[4] 1 Lomax' Dig. 188, 197.
[5] Bac. Read. 43.
[6] 1 M'Cord, Ch. 239.
[7] 13 Penn. 98.
[8] 1 Atkyns, 523.

ingly unusual mode of alienation, and the registry of our deeds stands in lieu of livery of seisin. Anciently, by this form of conveyance, the feoffee took the legal estate, but now feoffees to use have no interest or estate at all, but in respect of the contingent estate and uses limited in the deed, "they are but conduit pipes to lead the uses."[1] When a use is raised by feoffment, the feoffor having parted with the legal possession, out of which the statute serves the seisin, cannot stand seised to the use of the feoffor, as the bargainor or covenantor who retain in themselves the legal seisin and estate.[2] Cases of feoffment to use, we find but rarely in the books, they being generally not construed as such, unless to carry out the intention of the parties, which would otherwise be frustrated. The few decisions which the reports afford are based on general leading principles, easily capable of elementary compression, and valuable especially for their learning as to the construction of deeds.[3] The deed of lease and release, although the customary method of alienation in England, as it does not require the trouble of enrollment, has grown quite into disuse in this country. Contained in two instruments of conveyance, it has the effect of but one. The lessee estate being created by lease, of bargain and sale, the use being executed in the lessor without entry, the freehold which then vests in the releasor by way of enlargement, being an estate at common law, which does not require the aid of the statute to execute.[4] As the first conveyance has all the characteristic qualities of a deed of bargain and sale, and is like it, a mere contract to convey, the examination of that species of conveyance will suffice for this. The deed of bargain and sale is a real contract, by which the bargainor "bargains and sells," that is contracts to convey to the bagainee and thus becoming trustee for, or seised to the use of the bargainee, the statute completes the purchase. The bargain first raises the use, and the statute vests the possession, making complete the seisin, without livery or entry.[5]

To render a bargain and sale deed capable of execution by the statute, there must be an estate out of which a use can be raised,

[1] Noy's Tenures, 15.
[2] 8 Conn. 518.
[3] 4 Mason, 45; 3 Pick. 521; 9 Cowen. 437.
[4] 1 Wash. C. C. 70.
[5] 10 Johns. 456; 8 Cranch, 229; 2 Inst. 671.

and then a valuable consideration and words competent to raise a use. No precise form of words is necessary, if they actually amount to a present contract of sale. The words "remise, release and quit claim," "release and assign," "for value received," and "make over and confirm," will answer to raise a use by way of bargain and sale.[1] As to the consideration requisite—if a valuable one be proven it is competent to raise a use, although it be unexpressed.[2] Without such consideration the deed cannot operate.[3] Only the first use arising in a bargain and sale is executed, for no use can be served out of the possession of the bargainee to a third person, he can only be seised of the land to his own use, and in him alone can the legal estate be vested by the statute.[4] In Pennsylvania, by act of General Assembly, 1715, such deeds have the same effect for giving seisin and possession as feoffments, and as is the case with that species of conveyance, the use raised may be executed in any one in whose favor it is expressly declared by the deed.[5] The authorities are in conflict as to whether a freehold to begin *in futuro* can be created by deed of bargain and sale. In Massachusetts, and the New England States generally, it is held that a use takes instantaneous effect in the bargainee; the statute has then exhausted its jurisdiction, the only seisin out of which a use might be raised has passed from the bargainor, and nothing of energy remains in the statute to execute the use at the time limited.[6] In New York, the opinion of the court is stated to be that the seisin does not pass from the bargainor at the execution of the deed, but abides in him until the contingency happens, or the limited period has expired, and then the operation of the statute completes the purchase.[7] Of this opinion is the learned commentator on American law.[8]

By the deed of covenant to stand seised, a person seised of lands, covenants that he will stand seised of them to the use of another. On executing the conveyance, the other party becomes entitled to the use of the land according to the stipulations of the instrument,

[1] 10 Johns. 456; 3 Id. 484; 18 Id. 60. [2] 1 Cowen, 622. [3] 16 Johns. 515.
[4] 16 Johns. 304; Sanders on U. 364; 1 N. H. 65; 3 Johns. 388.
[5] 4 W. & S. 192. [6] 4 Mass. 235; 12 Id. 96; 22 Pick. 376.
[7] 1 Johns. Cas. 96; 3 Wend. 235; 20 Johns. 87; 9 Wend. 611. [8] 4 Kent's Com. 298.

and the possession and ownership is presently annexed to the use, and words will suffice to constitute this deed, which sufficiently indicate the intention.[1] Having the same effect as a deed of bargain and sale, there is an essential difference in the considerations necessary to support the two. Founded as it is on the consideration of blood or marriage, this deed of covenant to stand seised can only be effective between relatives, and no use can be raised for any purpose in one not within the influence of the domestic consideration.[2] The existence of a consideration other than that of blood or marriage does not impede the operation of the deed. Collateral consanguinity has been decided not to be a sufficient consideration to support the deed.[3] It is not essential that the consideration should be named in the deed, if it appears upon its face, or can be inferred from the relations of the parties,[4] for if the consideration of blood or marriage is at all necessary to support the deed, it is to be presumed when the fact of such consanguinity actually exists,[5] and the law even allows relationship to be averred and proven as the operating and controlling consideration, although a different one may be embraced in the deed, and no mention made of the existing consanguinity.[6] Property may by this method of alienation be conveyed directly from husband and wife.[7] Estates to commence *in futuro* may be and are usually created by this conveyance.[8] So a bargain and sale for a pecuniary consideration will operate as a covenant to stand seised to the use of the party within the pale of the consideration in order to effectuate the intention of the bargainor without any technical words for that purpose.[9] A deed reserving to the grantor the use and improvement of land during his life, operates as a covenant to stand seised to his own use during life, and after death to the use of covenantees and their heirs.[10] This species of deed duly recorded cannot be limited in its effect by a subsequent deed from the grantee to a third person, nor by such

[1] Willes, 637; 1 Sand. Ch. 258. [2] 16 Johns. 575; 22 Wend. 140.
[3] 1 Cowen, 622. [4] 1 Johns. Cas. 91; 3 N. H. 234.
[5] 7 Pick. 115; 20 Johns. 85; 4 Taunt. 20; 12 Mass. 95. [6] 18 Pick. 397.
[7] 2 Wils. 23; 16 Conn. 474. [8] 7 Mass. 384; 18 Id. 339; 4 Cowen, 427.
[9] 11 Conn. 545; 4 Mass. 135; 20 Johns. 85. [10] 1 Conn. 354; 3 N. H. 432; 3 Wend. 233.

deed is the possession of the grantor converted into one adverse to the covenantee.[1] A deed which is inoperative as a feoffment for want of proof of livery of seisin, or a release, if there be no lease to make it valid, or a deed of bargain and sale impeached for want of consideration, even in contradiction to its expressions, would still be operative as a covenant to stand seised, and pass the estate to the party entitled.[2]

It is requisite for the operation of the statute, and the execution of the use, that there should be a person seised to the use of some other person, a cestui que use *in esse*, and a use *in esse* in possession, reversion or remainder. To persons *in esse* the legal estate is executed immediately, and as to persons not *in esse*, it will vest presently upon their coming into being.[3] Whether the use will be executed, depends very much upon the intention of the parties, as evidenced by the instrument of conveyance. If the party seised to the use is simply to hold to the use of the cestui, then the statute executes the use into possession, but when it is necessary to the due execution of the trust imposed that the legal estate should remain in the hands of the person seised to the use, and when he is unable to perform the duties appurtenant to such trust other than by possessing a legal estate, in such cases the use remains unexecuted, and the doctrine of trusts, with its multifarious learning, is to be applied to its due construction.[4] When a conveyance of land is made "for the sole use and benefit" of a feme covert, it has long been well established that as the intention is to give an interest, separate in the wife and beyond the control of the husband, such provision is not an executed use, but a technical trust.[5] This is fairly expressive of the theory of the statute that the legal estate given must be commensurate with the use, and that if it only has the power to serve out a legal estate of precisely the same compass as was possessed before in the trust and confidence. Or, as the rule is laid down by the New York courts, "by the common law as well as by the statute, the trustee takes only that quantity of interest

[1] 4 Munf. 473.
[2] 1 Har. & John. 527; 6 Paige, 526.
[3] 2 Wash. 9; 4 Wend. 49.
[4] 1 N. H. 232; 12 Pick. 152; 1 Hill, 413.
[5] 1 Hill. on R. P. 300; 1 N. H. 65; 16 Pick. 327; 4 A. & E. 582.

which the purpose of the estate requires, and the instrument creating the use expressly demands or constructively permits.[1]

Whenever there is *in esse* a cestui que use, a well defined use and a seisin out of which the use may be served, the operation of the statute then ensues, the possession of the vendor is transferred to and becomes the possession of the purchaser *eo instanti* with the execution of the instrument of conveyance, and the property is wholly and at once legally vested in the person beneficially entitled.[2] When there is no suspension of the authority to alienate, the real intention of the party creating the use will in all cases be carried into effect. When the trust is passive, the design is accomplished by giving the cestui a legal estate; when active, by construing it to be a power in trust, if it cannot take effect as a technical trust.[3] The statute executes none but the first use, the seisin out of which the estate is passed is then exhausted,[4] but it will execute any number of uses, one after another as they arise.[5] When a conveyance may take effect at common law or under the statute, it operates at common law, unless the intention of the parties points adversly, and when the party seised to the use and the cestui is the same person, he never taketh by the statute unless there be a direct impossibility or impertinency for the estate to take effect by the common law.[6]

We have before noticed, in speaking of the estates which may be conveyed to uses under the English system, that they may be limited in fee, for life or years, and that the same position stands good in the American law the books furnish abundant decisions.[7] There are also certain technical requirements touching those to whom uses shall be limited by deed of bargain and sale, covenant to stand seised, &c., and we have before mentioned that a limitation of a use upon a use is not executed. In many instances the courts have not followed the peculiar rules of the common law concerning the limitations of use, but adhering to the doctrine that the statute executes after that "form, quality and condition as the cestui had in the

[1] 4 Denio, 385; 21 Wend. 147; 3 Coms. 525. [2] 13 Penn. 98; 1 Selden, 455.
[3] 3 Sandf. S. C. 174. [4] 9 Cowen, 437; 16 Johns. 304. [5] 10 Gill & J. 443.
[6] 3 Md. 505; 3 Johns. 388. [7] Kirby, 368; 9 Paige, 107; 10 Id. 266.

use," have originated limitations of estate totally unknown to the simplicity of the earlier law. Springing uses are limited to arise on a future event when no precedent estate is limited, and when they do not take effect in derogation of any preceding interest, the operation of the statute being as it were in abeyance until the use should arise.[1] Thus a freehold may be conveyed to begin *in futuro*, and the limitation is good by way of springing use.[2] When, however, there is an estate precedent capable of supporting a remainder, then it is to be construed as a remainder, and not a springing use.[3] Shifting or secondary uses are those which take effect in derogation of some other estate. They are common in family settlements, and are either limited by the deed creating them or authorized to be appointed by some person named in it.[4] The use limited to change by matter *post facto* or a use to arise hereafter in lieu of another limited in the mean time, as when in a deed a fee is given to two grantees, with a proviso that in case one shall die before a certain time, his estate shall go to the other, the instrument cannot operate as a common law conveyance, because it limits an estate upon a fee, but the limitation takes effect by way of shifting or secondary use.[5] Future uses are common, and take effect *in futuro* in distinction from those which vest in a certain person presently. Contingent uses are future, with still the difference that they depend upon the happening of some event. Kent says, they are limited to take effect as remainders.[6] Cornish draws the distinction, contingent uses and remainders, at great length and with much technical learning.[7] Fearne says, they may always take effect as remainders when limited upon a prior particular estate which it does not infringe, and possessed of the two qualifications necessary in a remainder, dependence upon a prior particular estate, and expectancy on its determination.[8] If the limitation by deed expires, cannot be executed, or was not to vest but upon the happening of a contingency, the use results back to the grantor creating it, for so much

[1] Mutton's Case, Dyer, 276, (b).

[2] 4 Mass. 135; 2 Wills. 75; 18 Pick 339; 9 Wend. 611.

[3] 2 Doug. 757; 22 Pick. 376; 1 Conn. 354.

[4] 1 Leon. 264 7 Pick. 11.

[5] 20 Johns. 85; 3 N. H. 432.

[6] 4 Kent's Com. 298.

[7] Cornish, 164.

[8] Fearne on Con. Rem. 11–20.

of the use as the owner of the land does not dispose of, remains still with and in him.[1]

Executed uses being no more liens on probity, but ownership in land, and possessing all the properties of legal estate are of course subject to all debts and liabilities consequent upon such ownership. Having such properties, a use *in esse* cannot be destroyed by the alienation of the person having the seisin of the land.[2] Nor can the grantor in a deed of covenant to stand seised by giving conveyance to a third person, convert his possession into one adverse to that of the covenantor.[3] In respect to future contingent uses, there must be a person seised to the use when the contingency happens, if they are to be executed; and if the estate of the feoffee to such uses be destroyed by alienation or otherwise before that contingency happens, the use is also destroyed.[4]

If we are at liberty to draw any conclusion from the preceding pages, we think it to be a safe one, that the system of uses in the American, as well as the English law, has insinuated itself deeply and thoroughly into all the regulations touching the alienation of real property. Formerly, used as a method of conveyancing to defraud creditors and keep the ownership of property uncertain and concealed in direct violation of the principles of the dominant tenure, which held that alienation should be open and ownership notorious, the system perhaps merited much of the objection which was urged against it. By pursuing uses from plain principles into all their consequences, and by occasional assistance from the legislative department, we think a nobler, rational, and as far as may be, a uniform system of law has been since established. Cestui que use no longer possessing a mere *jus precarium*, but having all the rights and subject to all the liabilities of legal ownership, and notoriety of transfer being effectually supplied by our registry laws, the system is made to answer all the demands and exigencies which may arise without producing aught of the fraud, inconvenience or private mischief meant by the statute to be avoided. Though the original design of that instrument may have been departed from widely, and

[1] 16 Conn. 484; 18 Pick. 397; 3 Johns. 388. [2] 1 Johns. Cas. 91.
[3] 4 Munf. 437. [4] 4 Kent's Com. 387; 22 Pick. 376.

though the machinery primarily intended to destroy the powers of an aristocratic clergy, is now used for the comparatively humble function of transmitting property from individual to individual, yet it has lost nothing of its dignity or usefulness. As to some of the old conventional prejudices and unwieldy requirements of the common law concerning the transfer of property, it has effected a complete though stealthy revolution, and inducted in lieu thereof provisions and conveyances, than which none are more necessary or practical. It stands also a *dernier* resort to effectuate conveyances by force of its energy when the machinery of the common or statute law proves unavailing. That courts have been compelled to have recourse to this doctrine in order to carry out the intention of the parties and effectuate conveyances void under the State statutes, the reports of Maine, New Hampshire, Delaware, North Carolina and others stand for example. The doctrine of uses forming then no inconsiderable portion of our law of conveyance, most of the panegyric which has been lavished upon the system by the English jurists, on account of the inconveniences prevented, the grievances concluded, and the open and practical method of transfer which it originated and perfected, is applicable to us. With reference to those States where the system is unrecognized or expressly abolished, we may say but a word. For the abrogation of the system, the objection most clamorously, and it would seem most successfully urged, has been that it perpetuated a great mass of useless requirements and technical jargon, and its abolition would to a great extent relieve the law of real property of its abstruseness and uncertainty. While it is very questionable whether in this crusade against the system of uses as now expounded and enforced, "the vigor and success of the war will come quite up to the lofty and sounding phrase of the manifesto," very certain it is, that the endeavor to abolish entirely what is termed the technical language and peculiar erudition of the law is both idle and useless. It is a judgment most imperfect to suppose that a science which is defined to be "the last effort of human intelligence acting upon human experience," struggling to combine inflexible rules with transactions and relations perpetually changing, the development of which has

engaged the attention of the subtlest and most profound intellects, could in this, its most important, intricate and technical department, be brought down to the general comprehension of even an intelligent and educated people. But the doctrine of uses has still another significance. The law of real property being founded on reasons mainly historical, surely its structure will be contemplated with more interest and its working more thoroughly understood and mastered by that intelligent practitioner who has accustomed himself to the comparison of past with actual and possible emergencies, and reflecting that *nihil simul inventum est et perfectum*, goes over all the familiar learning on the subject and traces institutions and laws to their origin to gain correct interpretation. Beyond the curious learning and speculative interest connected with this topic, viewing it as a system which has proven itself the parent of our present method of alienation and an important and all pervading element of our laws of conveyance, it cannot be that under any circumstances a considerate study of its theory and operation will be wholly useless or void of instruction.

C.

RECENT AMERICAN DECISIONS.

In the District Court of the United States for Ohio District.

EX PARTE SIFFORD, MARSHAL ET AL.

1. A return to a writ of *habeas corpus* issued by a judge of the United States, under the judiciary act of 1789, showing an imprisonment under process, legal and valid on its face, is conclusive, and precludes further inquiry into the cause of imprisonment.

2. But the seventh section of the Act of Congress of the 2d of March, 1833, expressly confers on a judge of the United States, the power to issue the writ of *habeas corpus*, in all cases of imprisonment by any authority of law, for any act done or omitted, in obedience to a law of the United States; and where such imprisonment is for an alleged violation of a State law, and by State authority, the judge or court issuing the *habeas corpus* may inquire into the circumstances under which the alleged crime was committed, with a view to the question whether the act complained of was done or omitted in the proper discharge of official duty, and under the authority of the United States: and, if it appears the act was so done or omitted, the judge or court is authorized to discharge the party from such imprisonment.